

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Application of Gowdy FM 95, Inc. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;

Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;

Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;

Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and

Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.

Today, we act on five of the oldest and most difficult radio assignment cases pending before us. Guided by the Communications Act, Commission precedent, and the Interim Policy we adopted in the Local Radio Ownership NPRM, we find in four of these cases that the license assignments are consistent with the public interest, and therefore we grant the applications. Relying on this guidance in our review of the license assignment in Charlottesville, Virginia, however, we cannot find based on the record before us that the license assignment is consistent with the public interest. Therefore, as required by the Communications Act, we designate that application for hearing.

Each of the five cases we decide today present difficult policy issues that arise from the increasing levels of concentration that have occurred in the radio market since 1996, when Congress significantly relaxed the limits on ownership of radio stations in a local market. A genuine concern about increased levels of concentration led the Commission to start “flagging” certain cases. Despite the Commission’s attempts, this ad hoc process too often led to inconsistent decision-making and delays in processing applications. To remedy this problem, and “to undertake a comprehensive examination of our rules and policies concerning local radio

ownership,” we adopted the *Local Radio Ownership NPRM*.¹ This proceeding will address difficult questions which to date have remained unresolved.

We recognized, however, that a final decision in the Local Radio Ownership proceeding would take time, and that too many radio assignment cases have been pending for too long. Accordingly, we established an Interim Policy, to provide greater transparency to the review process and to “guide our actions on radio assignment and transfer of control applications pending a decision in this proceeding.”² Under this policy, in addition to examining whether the proposed assignment complies with the Communications Act and the Commission’s rules, we conduct a competitive analysis of the proposed transaction and examine the potential impact of concentration in advertising markets. Our public interest analysis does not stop there, however. Unlike antitrust agencies, which focus solely on whether the effect of a proposed merger “may be substantially to lessen competition,”³ the Commission must examine other factors. Indeed, the Communications Act compels us to consider the broad aims of “ensuring the existence of an efficient, nationwide radio communications service”⁴ and promoting locally oriented service and diversity in media voices.

In short, the Communications Act does not permit the Commission to turn a deaf ear to radio listeners. Thus, while our competitive analysis is informed by antitrust principles, our ultimate obligation is to consider the potential benefits and harms of the transaction on the listening public. Where we find evidence that a proposed transaction will benefit listeners, we must weigh that factor against the potential harm to advertisers in determining whether the transaction is consistent with the public interest. We must also examine whether particular or unique circumstances of a market might mitigate the potential harm from such high levels of concentration. But where we cannot find an overall benefit to listeners or mitigating factors, we have no basis on which to conclude that the transaction will serve the public interest. In those cases, we must designate the application for hearing.

As stated, in four of the cases before us, the Commission found that, on balance and for different reasons, grant of the applications served the public interest. In Trenton, for example, we found that the “in market” stations capture only 36.7% of the Trenton audience, while the remaining 63.3% listen to “out of market stations.” Moreover, thirty “out of market stations” have enough Trenton listeners to meet BIA reporting data. We also found that, through its operation of WNJO (under an LMA agreement), the applicant has considerably improved the station’s performance through improved local news, weather and information.

In Cheyenne the record showed that the relevant geographic market is not the Cheyenne Arbitron metro because among other things, one of the tallest mountains in the area significantly limits the reach of the radio station signals of the assignor and assignee into each other’s service areas. Thus, we concluded that the stations do not today, nor will they in the future, compete for advertising. In Columbus, Georgia, we found that significant format and radio advertising competition from three large radio station groups, one new entrant, and one out-of market radio station would continue to exist after the transaction. Finally, in Columbus-Starkville, Mississippi, we found that the potential for competitive harm was outweighed by the significant

¹ *See, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001).

² *Id.* at 19894 (¶ 84).

³ 15 U.S.C. § 18.

⁴ 47 U.S.C. § 151.

public interest benefits to listeners, including greater access to locally generated radio programming.

In Charlottesville, however, no public interest benefits or mitigating circumstances were presented that would outweigh the high level of concentration that the proposed transaction would produce. Indeed, on the record before us, the only significant evidence presented was that the transaction would create a market in which the top two owners would have a combined 94.2% market share. This level of concentration, in the absence of any countervailing considerations or public interest benefits, is simply too significant for us to conclude that, on balance, the transaction is consistent with the public interest. Accordingly, in this case, we designate, as we must, the assignment application for hearing to determine whether grant would serve the public interest, convenience and necessity.